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December 27, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; WC Docket No. 01-338 (Triennial Review)

Dear Ms. Dortch:

During the course of Qwest's 271 application proceedings, a number of questions were raised regarding the manner in which incumbent LECs should price competitors' access to the unbundled high frequency portion of the loop (UNE HFPL), *i.e.*, line shared loops. In its recent order approving Qwest's 271 applications in 9 states, the Commission indicated that it intends to resolve such questions about the pricing of UNE line shared loops in the *Triennial Review*.¹ Covad urgently requests that the Commission resolve as soon as possible the questions about line shared loop pricing left open by the Commission in the *Qwest III 271 Order*, when it decides the *Triennial Review*. In addition, Covad herewith provides further clarification about the manner in which it fully compensates ILECs for access to UNE line shared loops under the Commission's TELRIC pricing rules.

As a general matter, the Commission's TELRIC pricing principles provide a framework of mandatory guidance to the state commissions, who apply the TELRIC methodology in determining the appropriate pricing of specific unbundled network elements,² including the UNE HFPL. Indeed, as the Commission acknowledged in the *Qwest III 271 Order*, it has already provided such guidance on the application of TELRIC to the UNE HFPL, in its *Line Sharing Order*³:

¹ See *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, FCC 02-332, para. 213 (rel. Dec. 23, 2002) (*Qwest III 271 Order*).

² See 47 C.F.R. § 51.505(e).

³ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report



[T]he *Line Sharing Order* announced that “states may require that incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services.”⁴

The Commission further noted in the *Line Sharing Order* that this pricing framework was consistent with TELRIC principles.⁵ Although the *Qwest III 271 Order* expresses some degree of uncertainty about whether this pricing principle is mandatory, as that order itself acknowledges, both the *Line Sharing Order* and the Commission’s subsequent *CALLS Order* treat this pricing principle as mandatory.⁶ The *Line Sharing Order* stated:

[b]y requiring incumbent LECs to provide access to the shared local loops for no more than they allocate to their own xDSL services, the price squeeze may be redressed by ensuring competitive LECs and ILECs incur the same cost for access to the bandwidth required to provide xDSL services.⁷

Furthermore, the *CALLS Order* stated:

“[t]he *Line Sharing Order* concluded that states should not permit incumbent LECs to charge more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services.”⁸

and Order in CC Doc. No. 98-147 and Fourth Report and Order in CC Doc. No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

⁴ See *Qwest III 271 Order* at para. 212 (quoting *Line Sharing Order*, 14 FCC Rcd at 20975, para. 138).

⁵ See *Line Sharing Order*, 14 FCC Rcd at 20975-76, para. 139.

⁶ See *Qwest III 271 Order* at para. 212.

⁷ *Line Sharing Order*, 14 FCC Rcd at 20976, para. 141 (emphasis added). The Commission’s use of the word “may” gives rise to the theory that the Commission intended to provide a suggestion, rather than direction, to state Commissions for use in pricing the linesharing UNE. Although the Commission should have used “shall” or “must” in place of the looser “may,” the Commission clearly intended to provide a mandatory direction to the states. See, e.g., Black’s Law Dictionary (7th Ed. 1999) (noting in definition of “may” that “[i]n dozens of cases, courts have held may to be synonymous with shall or must, usually in an effort to effectuate legislative intent.”). Indeed, it would be difficult to understand why the Commission would expend scarce resources setting out these detailed pricing principles and methodologies if it meant them merely as suggestions. Moreover, there is no question that the Commission’s TELRIC pricing methodology is not merely an option for state commissions to apply should they so choose – it is mandatory.

⁸ *Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13001, para. 98 (2000) (*CALLS Order*).



Given these prior Commission statements about the effect of the *Line Sharing Order*'s UNE HFPL pricing principles, there can be no doubt that the *Line Sharing Order* set forth these pricing principles as mandatory guidance for the state commissions. To the extent that the Commission's *Qwest III 271 Order* creates any doubts about the application of these pricing principles, Covad urgently requests that the Commission remove this uncertainty in its forthcoming *Triennial Review* decision, by reaffirming the mandatory nature of the *Line Sharing Order*'s line shared loop pricing framework under TELRIC.

In fact, for all the reasons already set out by the Commission in its *Line Sharing Order*, this pricing framework makes abundant sense: it is "a straightforward and practical approach for establishing rates consistent with the general pro-competitive purpose underlying the TELRIC principles."⁹ The Commission's HFPL pricing rules prevent ILECs from price-squeezing competitive carriers out of the DSL market by requiring the UNE price to be cost-based. As with any other UNE, state commissions are simply required to ensure that the price for the HFPL UNE is based on the actual cost of providing that UNE. As it happens, the ILECs themselves provide the cost data that facilitates the determination of that price. The fact is that the ILECs routinely allocate zero cost to their federally tariffed special access xDSL services over line shared loops, because they fully recover loop costs from their rate structure for the underlying basic voice services sharing the same loop.¹⁰ In other words, ILECs themselves routinely treat their xDSL services as resulting in zero incremental loop costs. In the *Line Sharing Order*, the Commission quite reasonably concluded that the ILECs' allocation of loop costs between their own basic voice and xDSL services serves as the best evidence for the incremental loop costs resulting from competitive provision of line shared xDSL services:

We find it reasonable to presume that the costs attributed by LECs in the interstate tariff filings to the high-frequency portion of the loop cover the incremental costs of providing xDSL on a loop already in use for voice services... Since the incremental loop cost of the high-frequency portion of the loop should be similar to the incremental loop cost of the incumbent LEC's xDSL special access service, this approach should result in the recovery of the incremental loop cost of the high-frequency portion of the loop.¹¹

⁹ *Line Sharing Order*, 14 FCC Rcd at 20975-76, para. 139.

¹⁰ See *Line Sharing Order*, 14 FCC Rcd at 20973, para. 133 ("The incumbent LECs' xDSL services are, in fact, sharing the local loop facility with their voice services. In setting prices for interstate xDSL services, moreover, incumbent LECs currently attribute little or no loop cost to those services.").

¹¹ *Line Sharing Order*, 14 FCC Rcd at 20976, para. 140.



Accordingly, under the Commission's quite sensible framework, the ILECs hold the keys to their own prison. If the true incremental cost of the high frequency portion of the loop is a non-zero positive cost, they have only to submit cost studies to the state commissions demonstrating the correct allocation of positive loop costs between their own voice services and their own line shared xDSL services. If the ILECs submit cost evidence allocating all of the loop costs to basic voice services, however, under the *Line Sharing Order* pricing framework that serves as the best evidence of the incremental loop costs resulting from the provision of the UNE HFPL to the ILECs' competitors – namely, zero. Simply put, the Commission's HFPL pricing rules require the ILEC to prove that it actually suffers additional cost in provisioning the linesharing UNE. If the ILEC itself proves that no such additional cost exists – as the ILEC typically does in its DSL tariffs – the ILEC should not be permitted to recover from its competitor any costs that the ILEC does not incur.

In addition to ensuring that the ILECs' rates for UNE HFPL are cost-based, the Commission's pricing framework in the *Line Sharing Order* also helps ensure that the rates are non-discriminatory, as required by the 1996 Act.¹² Specifically, the *Line Sharing Order*'s pricing framework helps ensure that the ILEC does not double-recover from competitors for loop costs it already recovers through its basic voice service rate structure:

[T]here could be a double recovery if the incumbent LEC recovered the full cost of the loop from its voice and related services while recovering an additional amount for loop costs from a competitive LEC for access to that same loop.¹³

Requiring competitors to pay for loop costs the ILEC already recovers separately from its regulated basic voice services would place competitors at a severe competitive disadvantage, by artificially inflating their costs to access loop facilities to provide xDSL services above the costs the ILEC incurs to access the same facilities. This would violate the Act's prescription that UNE rates be non-discriminatory.¹⁴ Furthermore, allowing the ILECs to double-recover from CLECs the loop costs they recover from basic voice services would run afoul of the Act's proscription against subsidization of competitive services with regulated service revenues.¹⁵ Specifically, requiring competitors to pay positive UNE HFPL rates while allowing ILECs to allocate zero loop costs to their own line shared services would enable the ILECs to subsidize their own xDSL services using basic voice service revenues. The only way to avoid creating such an implicit subsidy

¹² See 47 U.S.C. § 252(d)(1)(A)(ii).

¹³ *Line Sharing Order*, 14 FCC Rcd at 20975, para. 137.

¹⁴ See 47 U.S.C. § 252(d)(1)(A)(ii).

¹⁵ See 47 U.S.C. § 254(k). Specifically, the Act prohibits any telecommunications carrier from using its revenues from regulated services, such as ILEC basic voice service, to subsidize competitive services.



mechanism is to follow the pricing framework established in the *Line Sharing Order*, by requiring ILECs to allocate loop costs to UNE HFPL in the same manner they allocate loop costs to their own xDSL services.

It should come as no surprise that the ILECs routinely submit cost evidence to the states allocating all of their loop costs to basic voice services. In fact, the provision of line shared xDSL services should result in zero incremental loop costs. Unlike other services sharing common ILEC network facilities, the provision of line shared xDSL services requires no expansion or augmentation of the loop itself – the exact same loop already in place to provide voice services can be used to provide line shared xDSL. Accordingly, the provision of line shared xDSL service should result in no additional loop costs.¹⁶ This unique facility stands in stark contrast to other situations where common network facilities are expanded or augmented to accommodate additional new services (such as a central office expansion, or a switch processor upgrade), resulting in positive incremental joint and common costs. If an ILEC, however, deems otherwise, it has only to submit cost evidence to the relevant state commission showing the additional loop costs resulting from the provision of xDSL service and the forward-looking allocation of the total loop costs between basic voice and xDSL services. Again, the ILECs hold the keys to their own prison.

In addition, the Commission should not mistakenly conclude that, in states where ILECs have been unable to show positive loop costs attributable to the UNE HFPL, competitors purchasing the UNE HFPL are somehow obtaining a “free ride.” To the contrary, the zero loop rate simply ensures nondiscrimination in the loop rates, while the numerous other costs associated with accessing the linesharing UNE are still passed along to carriers like Covad.¹⁷ In the *Line Sharing Order*, the Commission recognized five types of direct costs that an incumbent LEC could incur to provide access to line sharing: “(1) loops; (2) OSS; (3) cross connects; (4) splitters; and (5) line conditioning.”¹⁸ The pricing framework established for the UNE HFPL – which, depending on the ILECs’ ability or inability to show non-zero loop costs, could result in a zero recurring rate – applies only to the first of the five types of costs identified by the Commission, namely loop costs. Regardless of where the recurring UNE HFPL costs are set, however, competitors still face positive, non-zero costs for obtaining access to the UNE HFPL under the other four categories of costs identified in the *Line Sharing Order*. For example, Covad pays upfront charges for splitter installations, OSS upgrades and inquiries, cross-connects, and other costs associated with obtaining access to the

¹⁶ In this connection, Covad notes that the Commission’s current rules require an ILEC to provide access to the UNE HFPL only for loops where the ILEC remains the voice provider. See 47 C.F.R. § 51.319(h)(3).

¹⁷ Under the UNE pricing standards in the 1996 Act, these charges may also include a reasonable profit for the ILEC apart from simply the cost of providing the network element. See 47 U.S.C. § 252(d)(1)(B).

¹⁸ *Line Sharing Order*, 14 FCC Rcd at 20974, para. 136.



linesharing UNE. In addition, Covad pays substantial nonrecurring charges for each linesharing UNE (which must be paid up front upon ordering), and also pays monthly recurring charges for the non-loop components of the linesharing UNE. In short, Covad pays substantially for the linesharing UNEs it orders, as well as the facilities-based network architecture that Covad has deployed in order to serve residential consumers over lineshared loops. In no sense, therefore, does establishing a zero rate for the UNE HFPL result in a “free ride.” Rather, in states where the ILECs attribute zero loop costs to their own xDSL services, setting a zero rate for the UNE HFPL simply results in non-discriminatory, cost-based loop pricing, as required under the Act.¹⁹

Unfortunately, the Commission’s statements in the *Qwest III 271 Order* about the line shared loop pricing framework in the *Line Sharing Order* have created uncertainty where before there was none. A number of state commissions have correctly applied the pricing framework in the *Line Sharing Order* to set UNE HFPL rates according to the costs the ILECs allocate to their own line shared xDSL services. It should come as no surprise that, because the ILECs routinely allocate no loop cost to their own xDSL services, the majority of these states have set the rate for the UNE HFPL at zero. In fact, as of December 2, 2002, of the 34 states in which Covad purchases the UNE HFPL to provide line shared services, 25 states (more than 73%) have approved a zero rate.²⁰

¹⁹ See 47 U.S.C. § 252(d)(1)(A)(i-ii) (requiring that UNE pricing be cost-based and non-discriminatory).

²⁰ The following states have established zero rates for the UNE HFPL: Alabama (Alabama Public Service Commission; Docket No. 27821; 5/31/02 Order; *GENERIC PROCEEDING TO ESTABLISH PRICES FOR INTERCONNECTION SERVICES AND UNBUNDLED NETWORK ELEMENTS*, Order (May 31, 2002)); Delaware (Line Sharing Amendment No. 1 to the Interconnection Agreement between Bell Atlantic - Delaware, Inc. and DIECA Communications, Inc. d/b/a Covad (June 21, 2000)); District of Columbia (Line Sharing Amendment No. 1 to the Interconnection Agreement between Bell Atlantic - Washington, D.C., Inc. and DIECA Communications, Inc. d/b/a Covad (June 21, 2000)); Florida (Florida Public Service Commission; Docket No. 001797; *In re: Petition by DIECA Communications, Inc. d/b/a Covad Communications Company for arbitration of unresolved issues in interconnection agreement with BellSouth Telecommunications, Inc.*; Order No. PSC-01-2017-FOF-TP (October 9, 2001)); Georgia (Georgia Public Service Commission; Docket No. 11900; *In Re: Investigation of BellSouth Telecommunications, Inc.’s Provision of Unbundled Network Elements for the xDSL Service Providers*, Order (June 11, 2001)); Illinois (Illinois Commerce Commission; Docket No. 00-0393; Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, Order on Second Rehearing (March 14, 2001), at pp .86-87; Ameritech Illinois Tariff No. 20, Part 19, Section 2, 1st Revised Sheet No. 32 (Filed April 21, 2000)); Kansas (Kanas Corporation Commission; 97-SWBT-411-GIT; *In the Matter of Southwestern Bell Telephone Company - Kansas’ Compliance With Section 271 of the Federal Telecommunications Act of 1996*, Order Approving Revisions to K2A (April 16, 2001); K2A Optional Line Sharing Amendment, Appendix 25: xDSL/Line Sharing/HFPL, at 21); Kentucky (Kentucky Public Service Commission; Administrative Case No. 382; *In Re: An Inquiry into the Development of Deaveraged Rates for Unbundled Network Elements*; Order (December 18, 2001)); Louisiana (Louisiana Public Service Commission; Docket No. U-24714, Subdocket A; *In re: Interim deaveraging of BellSouth Telecommunications, Inc., UNE Rates pursuant to FCC CC 96-45 9th Report and Order on 18th Order on Reconsideration rel. 11/2/99*, Order (September 21, 2001)); Maryland (Line Sharing Amendment No. 1 to the Interconnection Agreement between Bell Atlantic - Maryland, Inc. and DIECA Communications, Inc. d/b/a Covad, dated May 25, 2000, and, Maryland Public Service Commission, Case No. 8842, Phase II, *In the Matter of the Arbitration of Rythms Links, Inc. and Covad*



These figures show that the *Line Sharing Order*'s TELRIC pricing framework for the UNE HFPL is being faithfully applied by the vast majority of state commissions. By

Communications Company vs. Bell Atlantic-Maryland, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Order No. 76852 (April 3, 2001)); Massachusetts (Line Sharing Amendment No. 2 to the Interconnection Agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts and Covad Communications Company (May 26, 2000)); Michigan (Michigan Public Service Commission; Case No. 12540; *In the Matter of Application of Ameritech Michigan For Approval of Cost Studies and Resolution of Disputed Issues*, Opinion and Order (March 7, 2001), at p. 13. Ameritech Michigan Tariff No. 20, Part 19, Section 2, 3rd Revised Sheet No. 8.2); Minnesota (Minnesota Public Utilities Commission; Docket No. P-5692, 5710, 5827, 5638, 5670, 466, 421/CI-99-1665; *In the Matter of a Commission Initiated Investigation into US WEST Communication, Inc.'s Costs Related to the Provision of Line Sharing Services*, Order Setting Prices for Unbundled Network Elements (July 24, 2001)); Missouri (Missouri Public Service Commission; TO-99-297; *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Order Regarding Recommendation On 271 Application Pursuant to The Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), (March 15, 2001); see M2A Optional Line Sharing Amendment, Appendix to Attachment 25: xDSL - INTERIM APPENDIX HFPL, at 17 (SWBT - \$0.00)); New Hampshire (Line Sharing Amendment No. 1 to the Interconnection Agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic - New Hampshire and DIECA Communications, Inc. d/b/a Covad (June 21, 2000)); New Jersey (Line Sharing Amendment No. 1 to the Interconnection Agreement between Bell Atlantic - New Jersey, Inc. and DIECA Communications, Inc. d/b/a Covad (June 21, 2000)); New York (Line Sharing Amendment No. 3 to the Interconnection Agreement between New York Telephone Company d/b/a Bell Atlantic - New York and Covad Communications Company (May 25, 2000)); North Carolina (North Carolina Public Service Commission; Docket No. P-100, Sub 133d; *In re: Proceeding to Determine Permanent Pricing for Unbundled Network Elements*; Recommended Order Concerning All Phase I and Phase II Issues Excluding Geographic Deaveraging, June 7, 2001); Oregon (4/24/2000 Interim Line Sharing Agreement and IA, Appendix A); Pennsylvania (Line Sharing Amendment No. 1 to the Interconnection Agreement between Bell Atlantic - Pennsylvania, Inc. and DIECA Communications, Inc. d/b/a Covad (May 25, 2000); Tennessee (Tennessee Regulatory Authority; Docket No. 00-00544; *In re: Generic Docket to Establish UNE Prices for Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123*; Order (April 3, 2002) at Page 22); Texas (Texas Public Utility Commission; Docket No. 22168; *Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues* and Docket 22469; *Petition of Covad Communications Company and Rhythms Links, Inc. Against Southwestern Bell Telephone Company and GTE Southwest Inc. for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Interim Award (June 6, 2000), at 29 (\$0.00 - SWBT, \$0.00 Verizon). See also Texas Public Utility Commission; Docket 22469; *Petition of Covad Communications Company and Rhythms Links, Inc. Against Southwestern Bell Telephone Company and GTE Southwest Inc. for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Revised Arbitration Award (Sept. 21, 2001), at 130 (\$0.00 - SWBT, pending TPUC approval)); Utah (Public Service Commission of Utah; Docket No. 01-049-105, *In the Matter of the Application of US West Communications, Inc.'s for Approval of Compliance with 47 U.S.C. section 271(d)(2)(B)*); Virginia (Line Sharing Amendment No. 1 to the Interconnection Agreement between Bell Atlantic - Virginia, Inc. and DIECA Communications, Inc. d/b/a Covad (June 21, 2000)); Wisconsin (Public Service Commission of Wisconsin; Docket No. 6720-TI-161; *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Final Decision (March 19, 2002), D37 at p. 13).



creating new uncertainties about the application of this pricing framework, the Commission's risks undermining the hard work that these states have done, and that competitors like Covad have done, in reliance on the Commission's 1999 *Line Sharing Order*. It is incumbent on the Commission to clear up these new uncertainties as quickly as possible, by reaffirming in its *Triennial Review* decision that the *Line Sharing Order*'s TELRIC pricing framework for the UNE HFPL is mandatory.

Respectfully submitted,

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